Filed 6/4/03 P. v. Foster CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LOUIS FOSTER, Defendant and Appellant.	B152863 (Los Angeles County Super. Ct. No. BA198921)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alice E. Altoon, Judge. Affirmed.

William L. Heyman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Louis Foster appeals his conviction and sentence following a jury trial for the unlawful driving or taking of a vehicle and evading a police officer. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Foster was charged with the unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)) and evading a peace officer with willful disregard for the safety of persons or property (Veh. Code, § 2800.2, subd. (a)). The information also alleged Foster had suffered 11 prior prison terms within the meaning of Penal Code section 667.5, subdivision (b),[1] three prior serious or violent felony or juvenile adjudications within the meaning of the "Three Strikes" law (§§ 1170.12, subds. (a)-(d), & 667, subds. (b)-(i)) and three prior felony convictions within the meaning of section 666.5. Foster pleaded not guilty and denied all allegations.

1. *Foster's Taking of the Automobile and Evasion of Police*

According to the evidence presented at trial, a Lincoln Mark VII Town Car was taken from Jess Gutierrez's used car lot on February 14, 2000 without his authorization. Gutierrez, who did not see and could not identify the person who took the car, immediately reported the theft to the police. A few hours later Los Angeles Police Department Officers Nicole Brennan and Jose Avila were driving in an unmarked police car when the driver of the Lincoln, traveling at high speed, swerved in front of them. Discovering that the Lincoln had been reported stolen, Brennan and Avila followed the Lincoln and requested the assistance of an air unit and two additional police units in marked police cars.

Officers Alejandro Fuentes and Michael Menegio, responding to Brennan's call for assistance, activated the flashing lights and siren of their marked police car in an attempt to pull over the driver of the Lincoln. Officer Michael Rodriguez, above the scene in a police helicopter, used the helicopter's "night sun" to illuminate the Lincoln. Instead of pulling over, the driver of the Lincoln accelerated, at times to speeds of 115 to 120 miles per hour, weaved in and out of traffic, sideswiped another car, injuring its driver Robert Gil and his passenger, and ultimately crashed into two other vehicles, damaging the Lincoln and smashing its windshield. After the collision, the driver of the

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[1] Unless otherwise indicated, all statutory references are to the Penal Code.

Lincoln emerged from the car with blood on his head and face, looked in Fuentes's direction and then ran across the freeway and into a residential area. Both Brennan and Fuentes identified Foster as the driver of the Lincoln.

Officers lost sight of Foster momentarily, then found him a few minutes later scaling a fence of a nearby house. Foster had blood on his head, face and hands. Foster resisted when officers attempted to handcuff him, shouting "'this is another Rodney King. Get Channel 7 news . . . I want this on tape.'" One police officer jabbed Foster in the rib cage with his flashlight. Each of the officers at the scene denied excessive force was used to apprehend Foster or that any force was applied to his head or face.

2. *Foster Is Taken to the Hospital and the Lincoln Is Impounded*

Foster was arrested and taken to the hospital with cuts on his face and on his legs. Foster's clothes were removed and he was placed in a hospital gown. According to Dr. Scott Patterson, one of Foster's treating physicians on the date of the incident, Foster's injuries, including glass cuts to his face, were most likely caused by an automobile accident and his head hitting the windshield, although Patterson admitted on cross-examination that Foster's injuries could have been caused by any blunt trauma to the face with a glass instrument.

Officer Adam McCarron of the California Highway Patrol arrived at the scene after the accident and observed the Lincoln's smashed windshield and blood and glass debris in its interior. McCarron testified that, in his opinion, the damage to the Lincoln could have been caused by the car's occupant hitting the windshield.

The police department impounded the Lincoln on February 14, 2000, the date of the incident, and took photographs of the car and its interior. According to Detective Mark Warschaw, the photographs were taken in connection with an administrative investigation conducted, as a matter of departmental policy, whenever a suspect requires hospitalization following an arrest. The photographs depicted blood on the car's steering wheel and seats as well as its smashed windshield. The police did not collect fingerprint or blood evidence from the car. The car was released on February 16, 2000 to its owner, Gutierrez, without notice to Foster.

3. *Foster's Defense*

Foster, who represented himself at trial, did not testify. According to the defense theory of the case, Foster was not the driver of the Lincoln; the injuries he sustained on that day were caused not by an automobile accident, but by the police officers' use of excessive force when they arrested "the wrong man." Dr. Scott Fraser, an eyewitness identification expert, testified as to the various factors that can undermine the accuracy of an eyewitness identification. Two lay witnesses, Carol Childress and Cathy Gross, observed Foster's arrest. Childress testified two police officers' made "striking" motions toward the suspect (whom she could not identify because he was on his stomach). She believed the suspect was in pain at the time of the arrest. Childress was not certain if the officers actually hit the suspect. Gross observed three or four officers "flipping" the suspect and moving him around quite a bit even though the suspect hollered he was in pain. Gross did not see whether the officers struck the suspect.

4. *Verdict and Sentencing*

The jury found Foster guilty of the unlawful taking of a motor vehicle and evasion. Foster waived jury trial as to the prior conviction allegations. The court found true the prior strike and prison term allegations and denied Foster's request to dismiss the strike priors, finding that Foster did not fall outside the spirit of the Three Strikes law. The trial court sentenced Foster to an aggregate state prison term of 26 years to life, consisting of two concurrent terms of 25 years to life under the Three Strikes law for the unlawful taking and for the evasion, plus an additional one year on the unlawful taking count for the prior prison term pursuant to section 667.5, subdivision (b).

5. *Foster's Pretrial and Trial Motions*

Foster, representing himself throughout most of the pretrial and trial proceedings, made numerous pretrial and trial motions.

a. *Motion to dismiss for failure to preserve and disclose exculpatory evidence*

Prior to trial Foster moved to dismiss all charges on the ground the Los Angeles Police Department failed to preserve and disclose exculpatory evidence. Foster argued the police released the Lincoln without prior notification to him, the car could not be found and he was denied an opportunity to gather evidence from the car (blood and fingerprints) to prove he had not been the driver. The trial court denied the motion.[2] Later, during jury selection, the prosecutor informed the court the car had been located on Gutierrez's lot and had been there, according to Gutierrez, since the police department released it to him on February 16, 2000. Gutierrez purportedly told prosecutors the car had not been cleaned and was in the same condition as it had been just after the accident. Foster did not attempt to collect evidence from the Lincoln or seek a continuance of the trial for the purpose of collecting such evidence.

b. *The motion in limine to exclude photographs of the car*

Foster moved under Evidence Code section 1054.5 to exclude the photographs of the Lincoln taken while the car was impounded on the ground they were not timely produced to the defense. The photographs were produced to the defense on March 16, 2001. Trial began on July 19, 2001. The trial court denied the motion.

c. *The motion for a 30-day continuance*

On July 18, 2001, the day before trial, Foster moved for a 30-day continuance on two grounds: (1) The People's witness list identified three witnesses who Foster did not know were going to be called until a week before trial, and he had not had the opportunity to investigate and interview those witnesses.[3] The People responded that those witnesses had been identified (along with their addresses and telephone numbers) in

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[2] Foster's initial motion was heard on April 5, 2001. Foster renewed his motion to dismiss the charges at least five times, up to and including the date the car was located. Each time the motion was denied.

[3] Foster identified Gilbert Navarro, Jose Soto and Toscano Lewis as the three witnesses newly added to the People's witness list. None of those individuals testified at trial.

the police report produced to Foster as early as February 2000. (2) Foster's court-appointed expert was still reviewing audio tapes of administrative interviews with the officers who had arrested Foster to determine whether portions of the tapes had been deleted, and Foster did not know when the expert would be finished. The court denied the motion.

d. *The motion to appoint a pathologist*

Also on July 18, 2001 Foster filed an ex parte motion for the appointment of a pathologist, arguing expert testimony was required to rebut the prosecution's theory that his injuries were consistent with the type of injuries sustained in a car accident and not in an assault. The court denied the ex parte motion, finding no "substantial reason" for the appointment of a pathologist. Foster renewed the motion on the fourth day of trial; this time, the court granted the motion and appointed, at Foster's request, Dr. Barry Silverman. Later the same day, Foster learned Silverman was unavailable and advised the court that his investigator was attempting to locate another pathologist. The court responded: "Let me know when you find an expert and we will see what we can do in terms of that." Foster failed to raise the issue again.

e. *Foster's objection to statements contained in his medical file*

At trial, Dr. Patterson was asked whether he had an opinion as to how Foster had sustained his injuries. Patterson testified, without objection: "Per the [medical] reports . . . he was involved in a motor vehicle accident." The medical reports to which Patterson referred were authenticated in a sworn affidavit by the hospital's custodian of records[4] and contained several notations about a motor vehicle accident. In one section, the medical record states: "37 y.o. [(year old)] A.A. [(African American)]" "reports

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[4] Felix Rucker, custodian of records for the hospital, certified in a sworn affidavit that the medical records were true and correct copies of Foster's medical records on the date of the incident, that the records were "prepared by the personnel of the Hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business at or near the time of the act, condition or event." Foster did not object to the sufficiency of the affidavit under Evidence Code sections 1271 or 1564.

'after my accident, the police beat me up.'" Another page states: "37 y.o. male states driver in MVA [(motor vehicle accident)] @ high speed on Freeway . . . . Pt. states he was assaulted . . . by police in neck, chest . . . states ran 3 blocks when he got out of car." Asked about the statement in the record attributed to Foster, "[a]fter my accident the police beat me up." Patterson testified he knew Foster had made the statement "because [the statement] [wa]s in quotations." The hospital records (75 pages) were admitted into evidence as business records without objection.

After Patterson had been excused, the medical records admitted and the People's case concluded, Foster objected to the admission of certain pages of the hospital record attributing to him statements that he had been in a motor vehicle accident. The trial court overruled the objection.

f. *Jury instructions and the prosecutor's closing argument*

The jury was instructed with CALJIC No. 2.10: "There has been admitted in evidence the testimony of a medical expert of statements made by the defendant in the course of an examination of the defendant which were made for the purpose of diagnosis and/or treatment. These statements may be considered by you only for the limited purpose of showing the information upon which the medical expert based his opinion. This testimony is not to be considered by you as evidence of the truth of the facts disclosed by defendant's statements." In his closing argument, the prosecutor stated: "Mr. Foster would like you to believe that [information that he was in an automobile accident] was given to the hospital staff, to the doctor by the police. Why would the police say, 'the police beat me up,' and why would the police phrase it, 'after my accident?' And it is in quotations. So if you believe that he was in an accident, you can infer -- it is logical, it is common sense -- he was driving that car, he was fleeing from the police, and he was in that accident." Foster did not object that the prosecutor's comments were contrary to CALJIC No. 2.10.

CONTENTIONS

Foster contends the court erred in denying his motions to (1) dismiss all charges based upon the prosecutor's failure to preserve and disclose exculpatory evidence,

(2) exclude the photographs of the car, (3) appoint a pathologist, (4) continue the trial and (5) exclude certain statements in his hospital records. In addition, Foster asserts his sentence of 26 years to life violates due process and equal protection and constitutes cruel and unusual punishment.

DISCUSSION

1. *Any Failure to Preserve the Car or Clothes Did Not Violate Due Process*

a. *Governing law*

The due process clause of the Fourteenth Amendment requires state law enforcement agencies to preserve evidence "that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta* (1984) 467 U.S. 479, 488 [104 S.Ct. 2528, 81 L.Ed.2d 413] (*Trombetta*); *People v. Beeler* (1995) 9 Cal.4th 953, 976; *People v. Zapien* (1993) 4 Cal.4th 929, 964 (*Zapien*.) "'To fall within the scope of this duty, the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."'" (*People v. Catlin* (2001) 26 Cal.4th 81, 159-160.) Although the state's good or bad faith in failing to preserve evidence is ordinarily irrelevant to assessing whether its conduct amounted to a due process violation (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57 [109 S.Ct. 333, 337, 102 L.Ed.2d 281] (*Youngblood*)), it is of great significance when the challenge to the state's conduct is based on the failure to preserve *potentially* exculpatory evidence -- that is, "evidentiary material of which no more can be said than that it could have been subjected to tests, the result of which might have exonerated the defendant." (*Ibid.*) In that case, "'"unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."'" (*Catlin*, at p. 160, quoting *Youngblood*, at p. 58; see also *People v. Cooper* (1991) 53 Cal.3d 771, 810-811 [adopting the standard set forth in *Trombetta* and *Youngblood* to evaluate due process challenge under state law]; accord *Zapien,* at p. 964.)

"The presence or absence of bad faith by the police for purposes of the Due Process Clause . . . necessarily turn[s] on the police's knowledge of the exculpatory value

of the evidence at the time it was lost or destroyed." (*Youngblood*, *supra*, 488 U.S. at pp. 56-57, fn. *; *People v. Beeler*, *supra*, 9 Cal.4th at p. 1000.) Of significance is whether the state knew the evidence could form a basis for exonerating the defendant and failed to preserve it as part of a conscious effort to circumvent its constitutional discovery obligation. (*Trombetta*, *supra*, 467 U.S. at p. 488; *Beeler*, at p. 1000; *Zapien*, *supra*, 4 Cal.4th at p. 964.) Negligent destruction of (or failure to preserve) potentially exculpatory evidence, without evidence of bad faith, will not give rise to a due process violation. (*Youngblood*, *supra*, 488 U.S. at p. 58.) The trial court's findings as to whether the evidence was destroyed in bad faith are reviewed for substantial evidence. (*People v. Roybal* (1998) 19 Cal.4th 481, 509.)

b. *Substantial evidence supports the trial court's finding that the police did not, in bad faith, fail to preserve either the car or the clothes*

i. *The car*

Foster maintains the state's failure to notify him prior to releasing the car to its owner deprived him of the opportunity, while the car was in state custody, to subject the car to fingerprint and blood analysis and thereby effectively destroyed the car's evidentiary value to the defense. Foster insists this failure is tantamount to the destruction of exculpatory evidence in violation of due process.

Unlike the evidence usually at issue in cases alleging *Trombetta*/*Youngblood* error, the Lincoln was not destroyed but rather misplaced and then located prior to trial, purportedly in the same condition it had been in while in police custody. Foster had the opportunity either to subject the car to tests prior to trial or, if such tests could not be readily accomplished, to request a continuance on that ground. He did neither. In the absence of any prejudice caused by the state's conduct, Foster's motion to dismiss was properly denied. (*Zapien*, *supra*, 4 Cal.4th at p. 967 [prosecution's destruction of tape does not warrant extreme sanction of dismissal because transcription of tape relieved any prejudice caused by prosecution's conduct]; see also *United States v. Morrison* (1981) 449 U.S. 361, 365 [101 S.Ct 665, 66 L.Ed.2d 564] ["[A]bsent demonstrable prejudice,

. . . dismissal of the indictment is plainly inappropriate" even when the defendant's constitutional right to counsel was deliberately violated.].)

Even accepting, *arguendo*, Foster's contention the break in the chain of custody effectively destroyed the car's "evidentiary value" to the defense, Foster's due process challenge still fails. The most that can be said of the car is that it *could* have been subjected to tests, the results of which *might have* exonerated Foster. The failure to preserve potentially exculpatory evidence does not amount to a constitutional violation unless the defendant can demonstrate bad faith. As the trial court properly observed, the record in this case is entirely devoid of any evidence of bad faith. The car, to the extent it contained unprocessed fingerprints or blood, had no apparent exculpatory value at the time it was released, two days after the incident. In this regard, this case is similar to *People v. Roybal*, *supra*, 19 Cal.4th at page 510. There, the defendant argued that a doorjamb, taken into police department custody as evidence in a murder case, contained a fingerprint that, had it been processed, might have exculpated him from charges he murdered his neighbor and that the police department's failure to preserve the doorjamb (and the print contained thereon) deprived him of exculpatory evidence. The Court disagreed, observing that, at the time the doorjamb was lost, the unprocessed fingerprint had no apparent exculpatory value. (*Ibid.*)

Foster insists the bad faith of the Los Angeles Police Department is evidenced by its violation of Vehicle Code section 6171, requiring a law enforcement agency in possession of a stolen vehicle for evidentiary purposes to notify the defendant prior to releasing the car so that the defendant may be afforded a "reasonable opportunity for an examination of the motor vehicle" for use at trial.[5] Foster reads far too much into Vehicle

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[5] Vehicle Code section 6171 provides: "When criminal charges have been filed involving a motor vehicle alleged to have been stolen and the vehicle is in the custody of a peace officer for evidentiary purposes, it shall be held in custody or, if a request for its release from custody is made, until the prosecutor has notified the defendant or his or her attorney of that request and both the prosecution and the defense have been afforded a reasonable opportunity for an examination of the motor vehicle to determine its true

Code section 6171.[6] The act of releasing the vehicle to its owner without notification to defendant, at least under the facts and circumstances presented here, while perhaps negligent, does not inherently reflect bad faith. (*Zapien*, *supra*, 4 Cal.4th at p. 966 [although "highly improper" for police officer to destroy evidence, no due process violation where the exculpatory value of the evidence was not apparent at the time of its destruction and the officer who destroyed it "did not intend to deprive defendant of exculpatory evidence or to otherwise harm [the] defendant"]; cf. *Trombetta, supra,* 467 U.S. at p. 488 [compliance with police department procedure is evidence that officers acted in "good faith" in disposing of evidence].)

Foster argues the *combination* of a Vehicle Code section 6171 violation and the police department's use of "excessive force" during his arrest together demonstrate bad faith. Without belaboring the gaping hole in Foster's logic, we fail to see how the use of

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value to produce or reproduce, by photographs or other identifying techniques, legally sufficient evidence for introduction at trial or other criminal proceedings."

[6] Although we need not decide the issue, it is not readily apparent that Vehicle Code section 6171 even applies to a case charging a violation of Vehicle Code section 10851. Vehicle Code section 6171 was enacted as part of a comprehensive legislative scheme designed to "assist in the prevention, identification, investigation and prosecution of insurance fraud." (See Assem. Com. on Finance, Insurance and Public Investment, Analysis of Assem Bill No. 1926 (1993-1994 Reg. Sess.) as amended August 8, 1994.) By its terms, the statute is intended to provide a procedure permitting the defendant and the prosecutor to inspect the vehicle "to determine its true value" prior to the vehicle's return to its owner. (Veh. Code, § 6171.) Although the statute is not specifically limited to cases involving insurance fraud, it contemplates examination of the car for evidence of "true value," a factor of significance in fraud and theft cases (see Pen. Code, §§ 484 & 487) but not in unlawful taking cases. By its terms Vehicle Code section 6171 applies only when "criminal charges have been filed involving a motor vehicle alleged to have been *stolen* . . . ." (Veh. Code, § 6171, italics added.) Foster was charged with violating Vehicle Code section 10851, the unlawful driving or taking of a vehicle, which, unlike a theft charge, does not require an intent to steal. (Veh. Code, § 10851, subd. (a) ["Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with the intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether *with or without intent to steal the vehicle* . . . is guilty of a public offense . . . ."], italics added.)

excessive force at the time of Foster's arrest (if such force was in fact used) reflects an awareness of the car's exculpatory value at the time it was released.

Finally, Foster urges the violation of Vehicle Code section 6171, even if negligent and not in bad faith, should result in some sanction to the People because the state was able to gather evidence from the car (photographs) while Foster was effectively deprived of that opportunity. Although Foster raises an interesting point as to the appropriate sanction for the state's violation of Vehicle Code section 6171 (a sanction not mentioned in the statute itself), we need not resolve it here. Even if the photographs of the car (the only evidence the police department acquired from the car during the time it was in its custody) had been suppressed as a discovery sanction, it is not reasonably probable the result would have been more favorable to Foster. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The issue at trial was whether Foster had taken the car, not the condition of the car after the accident. Foster was identified at trial by Fuentes and Brennan as the driver of the car. Although the pictures were offered to show Foster's injuries were consistent with his having hit his head on the car's windshield, the photographs themselves were not necessary to this conclusion. In fact, every aspect of the condition of the car represented in the photographs was corroborated by the testimony of other witnesses. Fuentes, Brennan and McCarron testified to the condition of the car, the blood in the interior and the smashed windshield. Because the photographs only corroborated evidence from other witnesses, it is not reasonably probable their suppression would have yielded a more favorable result for Foster.[7]

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[7] Foster also asserts error in denying his motion under section 1054.5 to exclude the photographs of the car because they were not timely produced to the defense. The photographs, produced more than 30 days prior to trial, were timely produced. (§ 1054.7 "disclosures required under this chapter shall be made at least 30 days prior to the trial"].) In any event, as we have just explained, any error in failing to suppress the photographs was harmless.

ii. *The clothes*

Foster's contention that the failure to preserve his clothes also amounted to a due process violation is similarly meritless. Foster presented no evidence his clothes were in fact exculpatory (in that they failed to match a description of the clothes worn by the driver of the Lincoln), nor did he establish that there was no comparable way to demonstrate his attire on the date of the accident (for example, by the testimony of the hospital employees who attended to him, or the two lay witnesses who saw his arrest). (See *Trombetta, supra,* 467 U.S. at p. 490 [no due process violation in failing to preserve evidence where defendant had "alternative means" of presenting comparable evidence at trial].) In any event, because the most that can be said about the clothes is that they were potentially exculpatory, Foster was required to show the police failed to preserve the evidence in bad faith. (See *Youngblood, supra,* 488 U.S. at p. 57; *Beeler*, *supra,* 9 Cal.4th at p. 975.) Foster provided no evidence that his clothes were anything other than lost. In light of the absence of any evidence of bad faith, Foster's motion was properly denied.

2. *The Trial Court Did Not Commit Prejudicial Error in Denying Foster's Ex Parte Motion for the Appointment of a Pathologist and His Belated Request for a Continuance*

a. *The Motion for the Appointment of a Pathologist*

Foster contends the trial court erred in denying his ex parte motion for the appointment of a pathologist, made the day before trial was scheduled to begin. Any error in the court's initial denial of the motion was cured when it granted the motion five days later. Having granted the motion to appoint a pathologist (and later discovering that Foster's proposed expert was unavailable), the court placed the obligation on Foster to obtain a different expert or to alert the court as to his progress in that regard. Foster did neither. Any error in failing to obtain a pathologist was Foster's, not the trial court's.

In any event, Foster not only fails to demonstrate that his requested pathologist, Silverman, would have been available if his prior motion had been granted, but also utterly omits any argument as to how the absence of a pathologist was prejudicial.

(*People v. Watson, supra,* 46 Cal.2d at p. 836; *People v. Crayton* (2002) 28 Cal.4th 346, 364 [appellant bears burden not only of showing error, but also establishing that such error resulted in a miscarriage of justice].) Foster states only that a pathologist was necessary to rebut the expert testimony as to the cause of his injuries. The only medical expert testimony regarding the cause of Foster's injuries (as opposed to the cause of the damage to the Lincoln) was Patterson, who admitted that, although Foster's injuries were likely caused by a car accident, an assault could not be ruled out as the cause of his facial and body injuries. Foster offers no argument as to how the testimony of a pathologist would have differed from Patterson's. Thus, even if there were, by some strained interpretation, any error in the court's initial denial of the motion to appoint a pathologist that was not cured by its subsequent granting of the motion at trial, the error was harmless.

b. *The Belated Motion for a Continuance*

Foster challenges the court's denial of his motion for a 30-day continuance but again fails to demonstrate how denial of that motion was erroneous or prejudicial. A motion for continuance is properly granted only on a showing of good cause. (§ 1050, subd. (e); *Beeler*, *supra*, 9 Cal.4th at p. 1003.) The trial court has broad discretion to determine whether good cause exists; its decision will not be disturbed on appeal absent a showing that such discretion was abused. (*People v. Michaels* (2002) 28 Cal.4th 486, 525; *People v. Barnett* (1998) 17 Cal.4th 1044, 1126 [absent a showing of an abuse of discretion and prejudice to the defendant, a denial of a motion for a continuance does not require reversal of a conviction].)

Neither of the grounds Foster cited as a basis for the continuance remotely affected the trial. The audio tape of the interviews with the arresting officers was analyzed and transcribed for use at trial in a timely fashion. Moreover, the three witnesses added to the prosecution's witness list did not testify. In sum, Foster offers no basis, nor does the record disclose any, as to how the court's denial of his motion resulted in a miscarriage of justice.

3. *The Trial Court Did Not Commit Prejudicial Error in Overruling Foster's Objection to the Admission of Certain Statements in his Medical Records*

It is well settled that hospital records, if properly authenticated under Evidence Code section 1271,[8] may be admitted into evidence as business records. (*Springer v. Reimers* (1970) 4 Cal.App.3d 325, 338; *People v. Gorgol* (1953) 122 Cal.App.2d 281, 295-301.) Conceding in his opening brief that most of the hospital records themselves were admissible as business records, Foster argues that the pages with statements attributed to him admitting he had been in an automobile accident contain multiple hearsay. He asserts either the pages themselves, or the objectionable statements, should have been excluded. (See Evid. Code, § 1201; *People v. Reed* (1996) 13 Cal.4th 217, 224-225, 230 [each hearsay statement contained in the writing must meet an exception to the hearsay rule before the statements may be admitted into evidence for the truth of the matter asserted]; *Gorgol*, at p. 300 [multiple hearsay contained in a properly authenticated hospital record will not foreclose its admission as a business record; rather "[s]uch [objectionable] parts should be omitted or proper instruction of the court given concerning them"].)

The hospital records plainly indicated that the patient, Foster, told hospital personnel he had been in an accident. Foster's statements to hospital personnel, as offered by the prosecution, were admissions and therefore were not hearsay when offered against Foster. (Evid. Code, § 1220.) The trial court properly overruled Foster's objection on hearsay grounds.[9]

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[8] Evidence Code section 1271 provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

[9] Foster also argues the prosecutor committed misconduct by telling the jury in closing argument Foster had admitted to being in an accident. Foster insists the suggestion that the jury could view the evidence as an admission violated the instruction

Foster also asserts the trial court had no basis for finding the statements to be admissions because Dr. Patterson lacked personal knowledge that Foster (as opposed to the police officers) made the statements. It is difficult to determine whether Foster challenges Patterson's testimony concerning the documents (to which there was no objection) or the admission of the documents themselves. In either case, however, the contention fails. Patterson merely read the medical report, which plainly indicated Foster told hospital personnel he had been in an accident. No challenge was made at trial as to the trustworthiness of the report or its authenticity. (Evid. Code, § 1271, subds. (a)-(d).)[10] Patterson's apparent lack of personal knowledge that Foster made the statement is simply irrelevant.[11]

(CALJIC No. 2.10) that the jury could only consider such statements for the limited purpose of the basis of the doctor's diagnosis and treatment. Without speculating as to the reason this instruction was given in light of the fact the statement was an admission and therefore admissible against Foster for all purposes, we simply hold that, because Foster never objected to the remark and has not demonstrated on appeal that an objection could not have cured any alleged harm caused by the remark, the contention is not subject to appellate review. (*People v. McDermott* (2002) 28 Cal.4th 946, 1001.)

[10] In his reply brief Foster argues for the first time that the records were not properly authenticated as business records because the custodial affidavit failed to set forth "the mode of [the records'] preparation." Foster failed to make this specific objection in the trial court; accordingly, it is waived. (*Beeler*, *supra*, 9 Cal.4th at p. 981; Evid. Code, § 353 ["A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless [¶] (a) . . . an objection or a motion to exclude or to strike the evidence . . . was timely made and so stated as to make clear the specific ground of the objection or motion."]; see also *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8 [arguments raised for first time on appeal are waived]; *Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3 ["Points raised in [appellant's] reply brief for the first time will not be considered, unless good reason is shown for failure to present them before."].) In any event, the custodial affidavit, explaining the records were prepared by staff physicians and nurses in the ordinary course of business at or near the time of the event recorded, sufficiently sets forth the mode of the records' preparation.

[11] To the extent Foster's argument can be interpreted as a challenge to the admission of the records on the ground the hospital personnel to whom Foster is alleged to have made the statement did not testify, the contention is also without merit. Evidence Code

4. *Foster's Sentence of 26 Years to Life is Not Unconstitutional*

a. *Foster's Sentence is Not Cruel and Unusual Punishment*

Foster contends his sentence of 26 years to life under the Three Strikes law constitutes cruel and unusual punishment in violation of the United States Constitution and cruel or unusual punishment in violation of the California Constitution. The federal and state courts have consistently rejected claims that life terms imposed on recidivists under these circumstances violate the constitutional ban on cruel and unusual punishment contained in the Eighth and Fourteenth Amendments. (*Ewing v. California* (2003) ___ U.S. ___ [123 S.Ct. 1179, 1189-1190, 55 L.Ed.2d 108] ["In weighing the gravity of [defendant's] offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions"]; *Lockyer v. Andrade* (2003) ___U.S. ___ [123 S.Ct. 1166, 1174, 155 L.Ed.2d 144]; *Harmelin v. Michigan* (1991) 501 U.S. 957, 965 [111 S.Ct. 2680, 115 L.Ed.2d 836]; *Rummel v. Estelle* (1980) 445 U.S. 263, 284 [100 S.Ct. 1133, 63 L.Ed.2d 382]; *People v. Cooper* (1996) 43 Cal.App.4th 815, 820 (*Cooper*); *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630-1631; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1134-1137.) Nothing in Foster's long and prolific criminal history or in the dangerous nature of his current offenses warrants a different result.

b. *Foster's Sentence Under the Three Strikes Law Does Not Violate Substantive Due Process or Equal Protection*

Foster asserts the Three Strikes law violates substantive due process and equal protection "insofar as it yields harsher treatment of persons whose sequences of crimes is of decreasing seriousness than persons whose sequence of crimes is of increasing

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section 1271 does not require that the person who prepared the record testify. The object of the business records exception to the hearsay rule is "to eliminate the necessity of calling each witness." (*People v. Williams* (1973) 36 Cal.App.3d 262, 275; *People v. Gorgol, supra,* 122 Cal.App.2d at p. 299 [it is not necessary for each attendant physician and nurse to testify in order for the proper foundation to be laid for the record's admission].)

seriousness." This argument has been repeatedly and uniformly rejected. (*Cooper, supra,* 43 Cal.App.4th at pp. 828-830; *People v. Edwards* (2002) 97 Cal.App.4th 161, 164 (*Edwards*); *People v. Cressy* (1996) 47 Cal.App.4th 981, 993-994 (*Cressy)*; *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1329-1332 (*Kilborn*); *People v. Sipe* (1995) 36 Cal.App.4th 468, 482-483.)

Legislation that reasonably relates to a proper governmental goal does not violate substantive due process. (*Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1125; *Cooper, supra,* 43 Cal.App.4th at p. 829.) In declaring the purpose of the Three Strikes law to "'ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses,'" the California legislature has made a "'deliberate policy decision . . . that the gravity of the new felony should not be a determinative factor in "triggering" the application of the Three Strikes law.'" (*Ewing v. California, supra,* 123 S.Ct. at p. 1190, fn. 2.) This legislative choice is reasonably related to the legitimate public objective of "incapacitating and deterring recidivist felons" (*id.* at p. 1190) irrespective of the nature of their current offense. (*Edwards*, *supra*, 97 Cal.App.4th at p. 165; *Kilborn*, *supra*, 41 Cal.App.4th at pp. 1329-1330; *Cooper*, at p. 828-830.)

Foster's equal protection argument is similarly baseless. Because criminal defendants with a history of prior or serious felony convictions are not similarly situated to those without such histories, it is not a violation of equal protection for the legislature "to treat recidivist felons of the type described in the [T]hree [S]trikes law more harshly than those recidivists who have not yet qualified" for Three Strikes sentencing treatment. (*Cooper*, *supra*, 43 Cal.App.4th at p. 829; *Edwards*, *supra*, 97 Cal.App.4th at p. 164; *Cressy*, *supra*, 47 Cal.App.4th at p. 994.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL RECORDS

PERLUSS, P. J.

We concur:

JOHNSON, J.

MUNOZ (AURELIO), J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.